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THE QUASI-CONTRACTUAL REMEDY IN CASES OF EXPRESS CONTRACT INDUCED BY FRAUD

Legal duties are created by society for any sort of reason that seems good to society. Thus, where a harmful act has been done by the defendant with resulting profit to himself, the law can declare that these facts shall operate to create either a duty in the defendant to make good to the plaintiff for all the damage suffered by him or a duty in the defendant to restore to the plaintiff the amount of the profit wrongfully received by the defendant. Both of these alternative duties are secondary, remedial duties, created to redress the wrong done by a tortious act. The first is the duty that is enforced in the more common of tort actions like trespass and case. The second has come to be called a quasi-contractual duty, chiefly because the form of action in which it was recognized and enforced was *assumpsit*; by the use of fiction—so common in the growth of our law—the tort was said to be waived and a contract to be implied by the law. The use of the language of fiction, such as this, might well be expected to result in error and confusion. Such a result is made almost certain by the prevailing ignorance of the history and character of the common-law forms of

action and by the failure to make an analysis of such a complex legal concept as "contract" into simpler and more fundamental concepts.

In the case of *Prest v. Farmington* (1918, Me.) 104 Atl. 521, the plaintiff sued for the reasonable value of work and labor performed for the defendant, and to a plea by the defendant that the work was done under express contract replied that the contract was induced by the defendant's fraud. It was held that the plaintiff could recover nothing beyond the agreed contract price, even though he could have recovered more in an action of deceit and even though the reasonable value to the defendant of the work done by the plaintiff was more than the agreed price. The court expressly says that in such a case "indebitatus assumpsit" lies only for the contract price; that "Where the parties have made a contract for themselves covering the whole subject-matter, no promise is implied by the law"; and that "The duty to pay damages for a tort does not imply a promise to pay them, upon which assumpsit can be maintained."

The decision in this case can well be sustained for another reason given by the court, that the plaintiff had discovered the fraud at an early stage in the work and that his conduct since that time amounted to a ratification of the express contract. The same can be said of some of the cases cited by the court as authority.¹ As to the other reasons, however, there must be vigorous dissent.

Indebitatus assumpsit is substantially identical with the action of debt. To maintain either action at common law, it was necessary to prove that the defendant had received a *quid pro quo*, and in both actions the measure of recovery was the value of that *quid pro quo*. Such value, however, might have been fixed at a liquidated sum by the parties, and this sum would then be the measure of recovery. In neither form of action was it necessary to prove an express promise by the defendant.

The action of assumpsit was the form to be used in any case where the defendant had made an actual promise for a consideration, even though this consideration did not consist of a *quid pro quo* received by the defendant and even though he had promised no liquidated sum. As long as this form of action was a true action of trespass on the case, the measure of recovery was the damage suffered by the plaintiff, the amount by which his estate had been *decreased* by his giving the consideration; but by an unconscious process it departed from its tort parent, and the measure of recovery came to be the value of the thing promised, the amount by which the plaintiff's estate would have been *increased* by complete performance.

It is obvious that there was a large field in which the two forms of action overlapped, but each had its distinct and separate field also:

¹ *Ferguson v. Carrington* (1829, K. B.) 9 B. & C. 59. *Selway v. Fogg* (1839, Exch.) 5 M. & W. 83.

debt would lie in many cases where the defendant had never promised to pay, either expressly or by implication in fact; and assumpsit would lie even though the defendant had never received a *quid pro quo* and had not agreed to pay a liquidated sum of money.

The statement of the court in *Prest v. Farmington* that "Where the parties have made a contract for themselves, covering the whole subject-matter, no promise is implied by law" is one of those glittering generalities of which our legal literature is so full. It can be found repeated in scores of cases,² and in a considerable number it has caused an erroneous and unjust decision. In its proper signification it means no more than that when two parties are contracting expressly they are not contracting tacitly, that when parties reduce their agreement to words their mutual intentions will be determined by those words and not by mere inferences from other conduct. Where there is an express contract no other should be implied *in fact*.³ This rule is properly applied in all cases where the legally operative facts are the *words* of agreement, even though the plaintiff may be seeking a remedy in an action of debt or indebitatus assumpsit.⁴ Where the remedy on the express contract has been barred by the statute of limitations, the law will not construct a quasi-contractual debt in order to avoid the effect of the statute.⁵ But on the other hand, there are many classes of cases where a quasi-contractual debt was constructed by the law in spite of the existence of an express agreement. Such is the case where the express contract is unenforceable because of the statute of frauds;⁶ or because of illegality, the plaintiff not being *in pari delicto*;⁷ or even because of the non-fulfillment of some condition precedent by

² *Phelps v. Sheldon* (1832, Mass.) 13 Pick. 52; *Whiting v. Sullivan* (1810) 7 Mass. 107; *Steam Mill Co. v. Westervelt* (1877) 67 Me. 446, 449; *Stockett v. Watkins* (1830, Md.) 2 Gill & J. 326, 341 ("The law sometimes implies contracts, but never where there is an express contract"); *Walker v. Brown* (1826) 28 Ill. 378, 383 ("As in physics two solid bodies cannot occupy the same space at the same time, so in law and common sense there cannot be an express and an implied contract for the same thing existing at the same time"); *Young v. Hill* (1876) 67 N. Y. 162, 174 ("there being an express contract for the payment of the debt . . . the law will not imply another and a different agreement for the same purpose. *Expressum facit cessare tacitum*").

³ So the doctrine may very properly be applied where a workman sues for an additional sum over and above that for which he expressly agreed to do the work. *Waite v. Merrill* (1826) 4 Me. 102; *Massachusetts General Hospital v. Fairbanks* (1880) 129 Mass. 78; *Phelps v. Sheldon*, *supra*; *Walker v. Brown*, *supra*; *Cutter v. Powell* (1795, K. B.) 6 T. R. 320; *Ladd v. Bean* (1918, Me.) 104 Atl. 814.

⁴ *Steam Mill Co. v. Westervelt*, *supra*.

⁵ *Woodruff v. Moore* (1850, N. Y. Sup. Ct.) 8 Barb. 171; *Blanchard v. Blanchard* (1911) 201 N. Y. 134, 94 N. E. 630.

⁶ *Richards v. Allen* (1840) 17 Me. 296; *Cromwell v. Norton* (1906) 193 Mass. 291, 79 N. E. 433.

⁷ *Eastern etc. Metal Co. v. Webb* (1907) 195 Mass. 356, 81 N. E. 251; *Webb v. Fulchire* (1843) 25 N. C. 485.

the plaintiff himself.⁸ Therefore, the mere existence of an express contract is not itself a sufficient reason for refusing to recognize a non-contract debt based upon the unjust enrichment of the defendant. Such enrichment is an additional fact to be given an operative effect different from that of the contract itself; the words of the parties are not the only operative facts to be considered.

Where the defendant has committed a tort, thereby enriching himself at the plaintiff's expense, there are numerous classes of cases where the plaintiff is given an alternative remedy. He can recover damages in a tort action, measured by the loss he has suffered and without reference to the gain of the defendant; or he can sue in indebitatus assumpsit for the amount of the defendant's wrongful gain. If he chooses the latter remedy, he is said to "waive the tort."⁹ This is so well established that the citation of cases is hardly necessary.¹⁰ It is not material by what particular kind of a tort the defendant enriched himself; the rule is everywhere applied where the tort consisted of fraud and deceit.¹¹

This being the case, there should be no variation in the application of the rule even though the deceit or fraud occurred in the formation of a contract. In such a case the tortious acts of the defendant should operate as follows: the plaintiff should have the legal privilege of not performing his part, and the legal power of rescission; or he can enforce a secondary right to damages for breach of contract in case the defendant fails to perform as agreed; or he can maintain suit for damages in the tort action of trespass on the case; or he can repudiate the contract, waive the tort, and sue in indebitatus assumpsit

⁸ *Oxendale v. Wetherell* (1829, K. B.) 9 B. & C. 386; *Wolfe v. Howes* (1859) 20 N. Y. 197.

⁹ This is really a misdescription; for whichever remedy the plaintiff chooses, the tort is still one of the operative facts and must be proved. In indebitatus assumpsit, however, an additional operative fact must be proved—the *quid pro quo* or enrichment of the defendant.

¹⁰ See Arthur L. Corbin, *Waiver of Tort and Suit in Assumpsit* (1910) 19 YALE LAW JOURNAL, 221. The plaintiff is given a similar choice of remedies in cases where the defendant has committed a *breach of contract*, enriching himself at the plaintiff's expense. *Snow v. Prescott* (1842) 12 N. H. 535; *Clark v. Manchester* (1872) 51 N. H. 594. The choice is between express assumpsit for damages suffered and debt (or indebitatus assumpsit) for value received.

¹¹ This is universally true where the defendant obtained money from the plaintiff by fraud. No court doubts that the plaintiff can recover this money in indebitatus assumpsit, even though he might in the alternative have sued on the express contract or in tort for damages. *Morison v. Thompson* (1874) L. R. 9 Q. B. 480; *Steiner v. Clisby* (1894) 103 Ala. 181, 15 So. 612; *Byard v. Holmes* (1868) 33 N. J. L. 119.

Even where the defendant received value in goods or labor instead of money, authority is ample to sustain counts for work and labor and for goods sold. *Fenimore v. U. S.* (1797, U. S.) 3 Dall. 357 (stock obtained by fraud); Corbin, *Waiver of Tort* (1910) 19 YALE LAW JOURNAL, 221, *passim*.

for the value unjustly received by the defendant. Bringing suit in this last form is not a ratification of the express contract, as some courts have believed,¹² because it is an action of *debt* based upon the receipt of a *quid pro quo* and not upon mutual assent. The better considered authorities hold that the unjust enrichment of the defendant added to his tortious act operates to create a non-contract debt in the plaintiff's favor.¹³

It should be observed that this is not inconsistent with the court's statement in *Prest v. Farmington* that "the duty to pay damages for a tort does not imply a promise to pay them upon which assumpsit can be maintained."¹⁴ No doubt this statement is strictly correct in its exact form. Damages for a tort cannot now be recovered in assumpsit, even though assumpsit was originally a tort action for damages. But the receipt and the unjust retention of benefits resulting from the tort are separate operative facts, and these are amply sufficient as a basis for the action of debt or its actual equivalent *indebitatus assumpsit*. This is not an action for damages for a tort; for those damages are measured by the amount subtracted from the plaintiff's estate. Nor is it an action for damages for breach of contract; for those damages would be measured by the value of the performance promised by the defendant. Instead, it is an action of debt based upon the receipt of a *quid pro quo* by the defendant, which under the existing circumstances creates a non-contractual duty in the defendant to pay back the value received. To enforce this duty, *indebitatus assumpsit* was the proper form of action at common law; under the codes of procedure the duty is the same, to be enforced by "civil action."

A. L. C.

THE COLLECTION OF ROYALTIES FROM THE SUB-ASSIGNEE OF A COPYRIGHT

In *Barker v. Stickney* (1918, K. B.) 119 L. T. 73, the plaintiff was the owner of a copyright which he assigned to P, the latter undertaking to pay a royalty. P became insolvent, and his receiver sold all his assets to the defendant, who took an assignment of the copyright and agreed to pay the royalty. The owner then sued for royalties

¹² *Ferguson v. Carrington*, *supra*; *Kellogg v. Turpie* (1879) 93 Ill. 265.

¹³ *Roth v. Palmer* (1858, N. Y. Sup. Ct.) 27 Barb. 652; *Crown Cycle Co. v. Brown* (1901) 39 Or. 285, 64 Pac. 451; *Dietz's Assignee v. Sutcliffe* (1883) 80 Ky. 650; *Kayser v. Sichel* (1861, N. Y. Sup. Ct.) 34 Barb. 84.

¹⁴ The court cites *Cooper v. Cooper* (1888) 147 Mass. 370, 17 N. E. 892, a case that has been shown most convincingly to be erroneous. See Keener, *Quasi-Contracts*, 321-326. Though followed in *Payne's Appeal* (1895) 65 Conn. 397, 32 Atl. 948, and in *Graham v. Stanton* (1901) 177 Mass. 321, 58 N. E. 1023, there are several decisions *contra*. *Fox v. Dawson* (1820, La.) 8 Mart. 94; *Higgins v. Breen* (1845) 9 Mo. 497. See Woodward, *Quasi-Contracts*, sec. 184.